Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-889

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S, INC.,
Petitioners,

v.

EDGAR E. WHITWORTH,
d/b/a DINKIE'S FOOD MART,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

The Respondent seeks to minimize the significance for all municipalities of the issues presented by this petition by characterizing the City of Impact as having certain "shortcomings as a city." These aspersions are evidently based on the small size of the community and the nature of one of its principal businesses. However, the Supreme Court of Texas has twice upheld the validity and sovereignity of the City of Impact in spite of precisely such challenges. *Perkins v. Ingalsbee,* 347 S.W.2d 926 (Tex. 1961); *Perkins v. State,* 367 S.W.2d 140 (Tex. 1963).

The City of Impact, as the courts below correctly assumed, stands in no different legal position than any other validly chartered municipal government.

II.

The primary argument advanced by the Respondent in opposition to the petition is, in fact, a reason for granting the petition. The Respondent argues that the City of Impact has placed itself within the coverage of the antitrust laws by becoming a "participant in a private conspiracy," relying on this court's comment in *Parker v. Brown*, 317 U.S. 341, 351-52 (1943) that under the facts of that case there was "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." It was on this same passage that the court of appeals primarily relied in its first (and later re-adopted) opinion in this case. That court did not base its reversal of the trial court's judgment for Petitioners upon the state action issues decided by it, and later this Court, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Rather, the court below considered the mere allegation of "participation in a private conspiracy" sufficient to reverse the trial court judgment without reaching the questions under *Parker* and *City of Lafayette*. The holding by the Fifth Circuit underscores the significance of a primary undecided issue presented by this petition: the meaning of "participation in a private conspiracy" and the extent of its applicability to cities after *City of Lafayette*.

The Petitioners respectfully suggest that the issue whether a governmental body is a participant in a private

conspiracy (if indeed that is an issue) and the considerations elaborated upon by this Court in *City of Lafayette* are intertwined in such a manner as to deserve clarification by this Court. The threshold question, of course, is the viability of such a finding after *City of Lafayette*. In setting forth the extent to which cities may be liable under the Sherman Act, no plurality or concurring opinion in *City of Lafayette* addressed whether "participation in a private conspiracy" had any implications after that decision. Only Mr. Justice Blackmun, dissenting, made any reference to the concept and expressed the need for some clarification:

> The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all.

435 U.S. at 441. Nevertheless, the court of appeals in the instant case considered the concept of a "conspiracy with private parties" very much alive and would remand this case for consideration of whether the City of Impact's exercise of its zoning powers was a "bona fide governmental function." No effort was made by the court of appeals to relate it to *City of Lafayette* considerations. In particular, it is unclear whether the failure of a city to establish its entitlement to state immunity under *City of Lafayette* is one and the same as a finding that is participated in a private conspiracy. If they are different, their relationship is uncertain in light of *City of Lafayette's* silence on the issue. The Fifth Circuit's opinion indicates that *City of Lafayette* issues will be reached only if it is first determined that a city was not a partici-

pant in a private conspiracy. Under this analysis, it would be possible for city action to be immune under *City of Lafayette* standards yet still liable under a "conspiracy with private parties" theory.

If a finding of participation in a private conspiracy does strip a city's actions of immunity without regard to *City of Lafayette* considerations, it is unclear what would constitute such participation. While the Petitioners can understand judicial refusal to afford antitrust immunity to an individual who seeks to cloak his private acts as the acts of the government or to a governmental body which enters what essentially is the private sector, the instant case presents no such facts. Every act alleged to have caused the Respondent injury was an official and uniquely government act of the City of Impact. There was no notification or participation by the City in a private agreement "by others" to restrain trade. *Parker v. Brown, supra,* 317 U.S. at 352. To permit the official zoning acts of the city government to become a basis of antitrust liability would effectively impose liability for every municipal decision which happened to favor the interests of some citizens to the disadvantage of others. If, under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), there is no antitrust liability for individuals who, with anti-competitive intent, concertedly lobby a governmental unit for certain official action, the success of that immune activity should not result in liability for a city under the theory that it participated in a private agreement to restrain trade. If "participation in a private conspiracy" has any meaning after *City of Lafayette,* the instant

petition presents this Court with an opportunity to decide at what point a city's acts become participation in a private agreement.

III.

Whatever the significance and meaning of "participation in a private conspiracy," the instant petition also presents an important and unanswered question relating to the application of *City of Lafayette* standards. In particular, what direction is required by a state in order for its cities to be entitled to the same protection from antitrust review as the state itself? The Respondent would apparently require, as a condition of immunity, that the State of Texas enact special legislation acknowledging the particular action taken by the City of Impact and its effects. If such special legislation is required to insulate each governmental act of a city, then the fifty state legislatures will become super-city governments, reversing a policy to commit local matters to local discretion. The City of Impact engaged in the uniquely sovereign function of zoning pursuant to a detailed state plan for liquor regulation and local zoning as a part of such state regulation. Under that statutory plan, described in the petition, there could be no clearer indication of state direction to the City of Impact without the legislature actually determining the zoning of each lot. From the authority granted the City of Impact in the "area" of zoning and liquor regulation, the State of Texas has clearly "contemplated the kind of action complained." *City of Lafayette,* 435 U.S. at 415. Like the Arizona Supreme Court in *Bates v. State Bar of Arizona,* 433 U.S. 350, 362 (1977), the State of Texas

has "clearly and affirmatively expressed" state policy. Indeed the injury results from the State's refusal to grant liquor licenses contrary to local zoning regulation.

To permit, as would the court of appeals, the Respondent to continue his action in the face of the State's articulated plan for liquor regulation and zoning, understandably raises grave doubts among the nation's cities as to what type of state mandate is required after *City of Lafayette* in order to protect the exercise of their governmental functions. If special legislation is required to insulate cities from liability, they and the legislatures need to be so told. This petition provides the Court with the means to resolve these concerns.

IV.

The Respondent has also emphasized the significance of another issue—whether by merely alleging a conspiracy between a governmental body and private parties, he may avoid the normal requirement of standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, that the plaintiff be "injured in his business or property by reason of anything forbidden in the antitrust laws." The Respondent could not and cannot enter the liquor business on his property because in 1961, before its purchase by the Respondent, the lot was zoned residential and State law will not permit the issuance of a liquor license for a location so zoned. TEXAS LIQUOR CONTROL ACT, V.A.T.S. Penal Auxiliary Laws, Art. 666-24, 667-10 ½. The Respondent has not been injured in his "business or property" because these unchallenged state statutes and the valid act of city government prohibit his entry into the business alleged to have been injured.

The Respondent's attempt to characterize the Petitioner's argument as "Catch-22" is meritless because of the conceded validity of the zoning ordinance. Although he never sought a zoning variance or pursued any other remedies under state law, the Respondent's Original Complaint did, in addition to his antitrust allegations, contain a challenge to the ordinance under state statutory and constitutional law and federal constitutional law. However, in granting summary relief for the Petitioner, the district court held the ordinance to be valid. This holding was not challenged by the Respondent on appeal and the court of appeals assumed the ordinance's validity. Therefore, even if it were established that the Petitioner violated the antitrust laws as alleged, the zoning ordinance would remain valid and state law would continue to prohibit the Respondent from ever obtaining a liquor license for his residential lot until he chooses to seek and successfully obtain a zoning change through local procedures.

By permitting the Respondent to maintain an action for injury to a non-existent business, and one which can never come into existence by reason of state law, the court of appeals has redefined the concepts of causation

and injury to "business or property" in a manner requiring consideration by this Court.

Respectfully submitted,

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